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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.256 OF 2007

The Commissioner of Income Tax
Aayakar Bhavan, Near Holi
Cross High School, Contonment,
Aurangabad ..Appellant

Vs.

Godaveri (Mannar) Sahakari
Sakhar Karkhana Ltd., Shankar
Nagar, Tal. Biloli, Dist. Nanded..Respondent

WITH

INCOME-TAX APPEAL NO.259 OF 2007

The Commissioner of Income Tax
Aayakar Bhavan, Near Holi
Cross High School, Contonment,
Aurangabad ..Appellant

Vs.

Godaveri (Mannar) Sahakari
Sakhar Karkhana Ltd., Shankar

Nagar, Tal. Biloli, Dist. Nanded..Respondent

Mr. B.M. Chatterjee with Mrs. P.P. Bhosale and Mr. P.S.Sahadevan for the Appellants
Mr. S.N. Inamdar with Mr. A.K. Jasani, for the Respondents

CORAM: F.I. REBELLO & J.P. DEVADHAR, JJ.
DATE : 8TH OCTOBER, 2007

**JUDGMENT (PER F.I. REBELLO, J.):**

. Tax Appeal No.256 of 2007 is in respect of Assessment Year 1991-92 and Tax Appeal No.259 of 2007 is in respect of Assessment Year 1994-95.

2. The substantial question of law as formulated in both the Appeals is as under:-

> "Whether on the facts and in the circumstances of the case, the Tribunal was right in law in directing to allow the claim in respect of delayed payment of PF, if it has been paid upto the date of filing of Return of Income ignoring the fact that said amendment to the provisions of Section 43B of the I.T. Act was made with effect from 1st April, 2004 i.e. from Assessment Year 2004-05 and prior to that period, such contribution is to be allowed only when the same is paid before the due date of

respective month."

2. In both the Appeals the Assessment Officer disallowed the payment towards P.F. as being beyond the due date prescribed under the P.F. Act. The Assessee preferred an Appeal. The Commissioner of Income-tax (Appeals) followed the judgment of the Delhi Bench of the ITAT in the case of Additional C.I.T. vs. Vestas RRB India Ltd., dated 28th May, 2004 and relying on the said decision allowed the Appeal. The Revenue aggrieved preferred an Appeal to ITAT. The learned ITAT observed in para.3 as under;-

> "3. The first issue is in respect of delayed payment of P.F. and the disallowance was made u/s.43B of I.T. Act of the amounts as per the above chart of respective Assessment Years. In respect of this ground, we hereby follow a decision of Pune bench in the case of Indian Card Clothing Co. Ltd., ITA No.214/PN/98 and direct to consider the following three points before deciding the issue of disallowance to P.F. contribution.
>
> (i) The Section 43B would apply only to employer’s contribution while the deduction

in respect of employees contribution would be governed by the provisions of Section 36(1)(va);

(ii) The deduction in respect of employers contribution is to be allowed if the payment has been made by the assessee before the due date of filing of return;

(ii) In case of employees contribution, the deduction is to be allowed if the payment is made within the grace period of the due date as specified in section 36(1)(va)."

On examination of above mentioned requirement of law, the A.O. can allow the claim if the payment is within the ambit of following two conditions:-

i) In so far as the employer’s contribution is concerned, the same shall be allowed if it has been paid up to the date of the filing of the return, as provided u/s.43-B; and

ii) In so far as the employee’s contribution is concerned, the same shall be allowed if it is paid within the period allowed under the relevant rules including the grace period reckoning from the date of payment of wages/salary to the employees.

We hereby restore this ground to be decided pro-tanto, hence may be treated as allowed for statistical purposes."

. Revenue is aggrieved by the decision of the Tribunal referring the matter to the A.O. to the extent of the finding that in so far as the employer's contribution is concerned, the same shall be allowed if it has been paid up before the due date of filing of the return.

3. On behalf of the Revenue their learned Counsel submits that the deletion of the second proviso to Section 43B by the Finance Act 2000 with effect from 1st April, 2004 would only mean that Section 43B as it stands in so far as employer's contribution is concerned will be governed by the 1st proviso from 1st April, 2004.

. On the other hand on behalf of the assessee the learned Counsel submits that the amendment is curative. The amendment is resorted to for the purpose of removing the hardship occasioned by virtue of the proviso. In so far as Section 43B(a) is concerned the Supreme Court in the case of Allied Motors (P) Ltd. vs. Commissioner of Income-Tax 224 ITR 677 has held that the amendment to be curative

and retrospective. It is submitted that the proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation, so that a reasonable interpretation can be given to the section as a whole.

. Counsel for the parties have made reference to judgment as also to other material in aid of their respective contention to the construction that should be given. Consequent to the deletion of the proviso by to the Finance Act, 2003.

4. Section 43B was inserted by the Finance Act 1983 with effect from 1st April 1984. The two provisos were added by Finance Act 1987 with effect from 1st April, 1988. The second proviso was substituted by Finance Act, 1989 with effect from 1st April, 1989. The relevant portion of Section 43B as first enacted with the provisos reads as under:-

> "43B. "Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act

in respect of --

(a) any sum payable by the assessee by way of tax, duty, cess or fees, by whatever name called, under any law for the time being in force, or

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, or

(c) any sum referred to in clause (ii) of sub-section (1) of Section 36, or

(d) any sum playable by the assessee as interest on any loan or borrowing from any public financial institution or a State financial Corporation or a State industrial investment corporation, in accordance with the terms and conditions of the agreement governing such loan or borrowing, or

()e) any sum payable by the assessee as interest on any loan or advances from a scheduled bank in accordance with the terms and conditions of the agreement governing

such loan or advances, or

(f) any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee,

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him:

Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return."

"Provided further that no deduction shall in respect of any sum referred to in clause (b)

be allowed unless such sum has actually been paid during the previous year on or before the date as defined in the explanation below Clause (va) of sub-section (1) of Section 36.

The second proviso was substituted by Finance Act, 1989 with effect from 1st April, 1989 and read as under:-

"Provided further that no deduction shall in respect of any sum referred to in clause (b) be allowed unless such sum has actually been paid in cash or to by issue of a cheque or draft or by any other mode on or before the due date as defined in the explanation below Clause (va) of sub-section (1) of Section 36, and where such payment has been made otherwise than in cash, the same has been realised within 15 days from the due date."

The second proviso was deleted by Finance Act, 2003. The first proviso was also amended by the Finance Act, 2003 with effect from 1st April, 2004 by omitting the following words:-

"referred to in clause (a) or clause (c) or

clause (d) or clause (e) or clause (f)."

The section as it stood before the Finance Act, 2003, treated payments in respect of tax, duty, cess or fee, payment made to an employee, as bonus or commission or services rendered as set out therein any sum payable by the assessee as interest on any loan or borrowing from any public financial institution as set out therein, any sum payable by the assessee as interest or any loan advances from a scheduled bank as set out therein and any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee as one class of deductions and employer’s contribution by way of contribution to the Provident Fund as another class.

5. Section 36(va) with the explanation reads as under:-

"(va) any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee’s account in the relevant fund or funds on or before the due date.

Explanation.-- For the purpose of this

clause, due date means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise."

6. We may now briefly trace the history of Section 43B and the relevant amendments from time to time. In terms of Section 145 of the Act, profit and gains of business or profession are computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. An assessee who had adopted the mercantile system of accounting would be entitled to account for his income and expenditure on the basis of accrual and not on the basis of actual receipt or disbursement. Word "paid" is defined under Section 43(2) of the Act to mean actually paid or incurred according to the method of accounting on the basis of which the profits or gains are computed.

7. The Finance Act, 1983 inserted Section 43B as the Government noted that statutory liabilities including employer's contribution to P.F. remained pending for a long time, some times extending over

several years whereas the assessee for the purpose of income tax assessment claimed the liability as deduction on the ground that they made accounts on mercantile or account basis. On the other hand, they dispute the liability and do not pay the same. For some reason or the other these liabilities were disputed and not discharged. In some cases undisputed liabilities were not paid on certain grounds.

8. The Memorandum explaining the provisions of the Finance Act, 1989 which substituted the second proviso set out that the aforesaid proviso was introduced to remove hardship caused to certain tax payers (1989) 176 ITR (St.) 124. The relevant note read as under:-

> "Under the existing provisions of section 43B of the Income-tax Act, it is also provided that any sum payable by the assessee as an employer by way of contribution to the provident fund or superannuation fund, etc., is not allowable as a deduction unless the same is paid during the previous year on or before the due date. The payment in respect of the last month of a previous year shall have to be made by the due date and cannot possibly

be made in the previous year itself. It is, therefore, proposed that the words during the previous year occurring in the second proviso to Section 43B be deleted."

Noting the hardship being occasioned in the matter of deduction regarding employer’s contribution, unlike other payment referred to in Section 43B of the Income-tax Act, the memorandum noted that to avoid any hardship being caused on account of reasons of postal delay, strikes or long holidays, it is proposed to provide that if any sum payable by the employer by way of contribution to any P.F. or superannuation fund or gratuity fund or any other fund for the welfare of employees, if made by cheque, draft or any other mode, has been tendered by the due date, and the actual payment has been realized within fifteen days of the due date, deduction shall be allowed.

9. By Section 21 of the Finance Act, 2003, the following amendments were incorporated in Section 43B of the Act, 2003.

. In the first proviso, the words, brackets and letters "referred to in clause (a) or clause (c) or clause (d) or clause (e) or clause (f) have been omitted. The second proviso was omitted.

. In the Finance Minister's Budget Speech Act (2003) 260 ITR (St.) 26, 27 pars. 137 to 144 of the Finance Bill, the Honourable Finance Minster indicated the setting up of the Task Force on Direct-Indirect Taxes under the Chairmanship of Dr. Vijay Kelkar. The Minister noted in his speech, that the suggestions made by the Task Force were to eliminate procedural complexities, reduce paper work, simplify tax administration and to enhance efficiency, also integrate such tax proposals as the system can at present absorb. The report of the Kelkar Committee has been published in (2002) 258 ITR (J) 1. It would be necessary to reproduce the following paragraph:-

> "In terms of the provisions of section 43B of the Income-tax Act, deduction for statutory payments relating to labour, taxes and State and public financial institutions are allowed as deductions, if they are paid during the financial year. However, under the provisions payment of taxes and interest to State and public financial institution are deemed to have been paid during the financial year even if they are paid by the due date of filing of return. Further if the liability is discharged in the

subsequent year after the due date of filing of return, the payment is allowed as a deduction in the subsequent year. In the case of statutory payment relating to labour, the deduction for the payment is disallowed if such payment is made any time after the last date of payment of the about related liability. Trade and industry across the country represented that the delayed payment of statutory liability related to labour should be accorded the same treatment as delayed payment of taxes and interest, i.e. they should be allowed in the year of account.

Since the objective of the provision is to ensure that a tax-payer does not avail of any statutory liability without actually making a payment for the same, we are of the view that these objectives would be served if the deduction for the statutory liability relating to labour are allowed in the year of payment. The complete disallowance of such payments is too harsh a punishment for delayed payments. Therefore, we recommend that the deduction for delayed payment of statutory liability relating to labour should be allowed in the year of payment

like delayed taxes and interest."

10. We may also refer to the Memorandum explaining the provisions in the Finance Bill, 2003 in the matter of Section 43B. The relevant portion reads as under:-

> "The Bill also proposes to provide that in case of deduction of payments made by the assessee as an employer by way of contribution to any provident fund or superannuation fund or any other fund for the welfare of the employees shall be allowed in computing the income of the year in which such sum is actually paid. In case the same is paid before the due date of filing the return of income for the previous year, the allowance will be made in the year in which the liability was incurred.
>
> These amendments will take effect from 1st April, 2004 and will, accordingly apply in relation to the assessment year 2004-05 and subsequent years. (Clause 18)"

The Notes on Clauses the relevant portion reads as follows:-

"It is also proposed to amend the first proviso to the said section so as to omit the references of clause (a), clause (c), clause (d), clause (e) and clause (f) which is consequential in nature.

It is also proposed to omit the second proviso to the said section. These amendments will take effect from 1st April, 2004 and will, accordingly, apply in relation to the assessment year 2004-2005 and subsequent years."

11. With the above background we may consider the judgment in Allied Motors (P) Ltd. vs. Commissioner of Income-tax 224 ITR 677. The Supreme Court relied on the Memorandum explaining the provisions in the Finance Bill, 1983 as also the Budget Speech of the Finance Minister in the year 1983-84 and observed as under:-

"Section 43B was, therefore, clearly aimed at curbing the activities of those tax-payers, who did not discharge their statutory liability of payment of excise duty, employer’s contribution to provident fund, etc., for long periods of time but claimed deductions in that regard from their

income on the ground that the liability to pay these amounts had been incurred by them in the relevant previous year. It was to stop this mischief that Section 43B was inserted. It was clearly not realised that the language in which section 43B was worded, would cause hardship to those tax-payers who had paid sales tax within the statutory period prescribed for this payment, although the payment so made by them did not fall in the relevant previous year. This was because the sales tax collected pertained to the last quarter of the relevant accounting year. Therefore, even when the sales tax had in fact been paid by the assessee within the statutory period prescribed for its payment and prior to the filing of the income tax return, these assessees were unwittingly prevented from claiming a legitimate deduction in respect of the tax paid by them. This was not intended by section 43B. Hence, the first proviso was inserted in section 43B. The amendment which was made by the Finance Act of 1987 in Section 43B inserting, inter alia, the first proviso was remedial in nature, designed to eliminate unintended consequences which may cause undue hardship

to the assessee and which made the provision unworkable or unjust in a specific situation."

. It had been argued before the Supreme Court, that looking to the curative nature of the amendment made by the Finance Act of 1987, the proviso inserted by the amending Finance Act of 1987 should be given retrospective effect and be read as forming part of Section 43B from its inception. Also several High Courts had also held that the proviso is retrospective. The Supreme Court relied on Explanation 2 which was added to Section 43B by the Finance Act of 1989 with retrospective effect from April 1, 1984. The Memorandum explaining the reasons was considered. It set out that certain Courts have interpreted that the amount payable in a particular year should also be statutorily payable under the relevant statute in the same year. It was noted that this is against the legislative intent and, therefore, by way of inserting a clarificatory amendment and for removal of doubts that the words "any sum payable" be defined to mean any sum, liability for which has been incurred by the tax-payer during the previous year irrespective of the date by which such sum is statutorily payable. The amendment will take effect from 1st April, 1984.

. The learned Supreme Court also relied on Departmental Circular No.550 dated 1st January, 1990 the judgment in R.B. Jodha Mal Kuthrada vs. CIT (1978) 82 ITR 570 and relying on the G.P.Singh's Principles of Statutory Interpretation, 4th Edition, page 2901 observed that "it is settled that if a statute is curative or merely declaratory of the previous law, retrospective operation is generally intended". The Court, therefore, held in the circumstances set out that the first proviso was in the nature of curative legislation and consequently held the legislation to be retrospective.

12. Is it possible to apply the same interpretative principle to Section 43(b) in so far as the omission of the second proviso and deletion in the first proviso. When the two provisions were added 43(b) was covered by the second proviso and the first proviso covered the other provisions. They were treated as two different classes. The Finance Act of 1987, therefore, treated Section 43B(b) as a distinct class from the other provisions. Noting certain hardships that were being occasioned by the operation of the second proviso, the Finance Act, 1989 substituted the second proviso. Parliament in its wisdom chose not to delete the second proviso but substituted the same by Finance Act of 1989 by noting the hardship

that may be occasioned by the language of the second proviso as it stood. Parliament, therefore, intended that Section 43B (b) be treated as a class by itself distinct from the other sub-sections.

. The Finance Bill of 2003 was basically based on the report of the Kelkar Committee and the need to simplify the tax laws. Kelkar Committee report recorded that Trade and industry across the country represented that the delayed payment of statutory liability related to labour should be accorded the same treatment as delayed payment of taxes and interest, i.e. they should be allowed in the year of account. This was because even if the employees dues towards contributory P.F. were paid but after the due date an employer was not entitled to deduction of the amounts either for that assessment year or any other assessment year. The Notes on Clauses and the Memorandum Explaining the provisions seeks to give effect to these amendments from 1st April, 2004 and to apply in relation to the assessment year 2004-2005. In the face of this material, which are normal aids to construction, it cannot be said that because the second proviso has been omitted by the Finance Act, 2003 and Section 43B is also now covered by the first proviso. The proviso as it now stands has to be read as curative and to be read retrospectively from the first

introduction of Section 43B by the Finance Act. As noted earlier the proviso was substituted in 1989 on account of hardship noted. Parliament did not do away with the proviso, but only substituted the same. It is only in 2003 based on the recommendations of the Kelkar Committee who responded to representation by Trade and Industry that the Finance Bill was introduced with the clear intent that it would be prospective.

13. The Section as amended consequent to the omission of the second proviso came up for consideration before the Madras High Court in Commissioner of Income-tax vs. Synergy Financial Exchange Ltd., 288 ITR 366 (Madras). One of the points considered was as under:-

> "Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in deleting the disallowance of Rs.1,45,399/- being the provident fund payments applying the
>
> provisions of Section 43B of the Income-tax Act, 1961?"

In that case the relevant assessment year was 1994-95. The Court noted that the fiscal legislation imposing liability is generally governed

by normal presumption that it is not retrospective and that in interpreting the statute, the Courts in the first instance have to consider the plain literal language of the statute. If on so reading it is not possible to give effect to the intent of Parliament, then the Courts resort to purposeful interpretation to give effect to that intent. The Court did not read the amendment as retrospective.

. The Assam High Court in Commissioner of Income Tax Vs. George Williamson (Assam) Ltd. 284 ITR 619 rejected the contention that the amendment should be read as retrospective.

14. After the arguments were concluded and the matter was posted for judgment and before the judgment could be delivered the learned Counsel draws our attention to a judgment of the Karnataka High Court in Income-tax Appeal No.1088 of 2006 between the Commissioner of Income Tax, Central Circle vs. M/s.Sabari Enterprises and other matters decided on 3rd July, 2007. Considering the Finance Act, 2003 the Karnataka High Court has held that if the assessee had paid P.F. dues by the period stipulated under Section 36(1)(va) the assessee's contributions to PF are allowable deductions, as the amendment is curative. Reliance was placed on the judgment in Allied Motors Pvt.

Ltd. (supra).

15. In the first instance the amendment is made applicable from the assessment year 2004-2005. Similarly, in interpreting statutory provisions, the Court also considers the mischief Rule, namely what was the state of law before the Act or the amendment and what is the mischief that the Act or the amendment seeks to avoid. From the normal aids to construction which we have earlier noted the only mischief that the amendment if and at all seeks to obviate is the need to eliminate the procedural complexities, reduce paper work, simplify tax administration and to enhance efficiency and also integrate such tax proposals as the system can at present absorb and acceptance of the representation made by Trade and Industry that they should not be denied the benefits of deductions on account of delayed payment of taxes and interest. The law as it stood earlier was that the employers contribution to P.F. if not paid within the due date the employer was not entitled to deduction. Right from the introduction of Section 43B, apart from the amendment carried out by 1989, the law was that if the employer did not pay the contribution by the due date then it was not liable for deduction. This position has been remedied, and the remedial measure made applicable from the assessment year 2004-2005.

Having noted the history of the legislation, the Memorandum Explaining the provision in the Finance Bill, 2003, the Notes on Clauses and the language of the amendment itself we are of the considered view that the omission of the second proviso was not curative and consequently it cannot be said that the amendment is retrospective.

16. For the reasons discussed above we are of the opinion that it is not possible for us to agree with the view taken by the Karnataka High Court.

17. In the light of the above conclusion, the question as framed in both the Appeals has to be answered in the negative, in favour of the Revenue and against the Assessee. Order accordingly.

**(J.P. DEVADHAR, J.)** **(F.I. REBELLO, J.)**